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In The

Supreme Court of the United States

October Term, 1996

STEINEY J. RICHARDS,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Wisconsin

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. THE QUESTION OF REASONABLENESS OF AN UNANNOUNCED FORCIBLE ENTRY INTO THE HOME REQUIRES A PARTICULARIZED EVALUATION OF THE FACTS OF EACH CASE, NOT JUST PIGEONHOLING IT AS A DRUG DELIVERY CASE.

A. Determining whether announcement is required requires a particularized evaluation of the circumstances in each case.

Whether or not an announcement is required is a reasonableness inquiry. *Wilson v. Arkansas*, 115 S.Ct. 1914, 1918, 1919 (1995). How a search is conducted is always a reasonableness inquiry. *Terry v. Ohio*, 392 U.S. 1, 18-19 (1968); *Dalia v. United States*, 441 U.S. 238, 258 (1979). In the protective sweep case, *Maryland v. Buie*, 494 U.S. 325, 334, 336, 337 (1990), the Court held that specific and articulable facts must be shown to authorize the police to look for others present in a home. *Buie* "offers guidance by analogy here" because it is the closest case on the law and facts. *Cf. Maryland v. Wilson*, No. 95-1268 (Feb. 19, 1997) slip op. 4.

In *Whren v. United States*, 116 S.Ct. 1769, 1776-77 (1996), the Court recognized balancing in the manner a probable cause-based seizure of a vehicle was conducted. A traffic stop is not "extraordinary" or "extreme" but an unannounced entry in the home is:

> Where probable cause has existed, the only cases in which we have found it necessary actually to perform the "balancing" analysis involved searches or seizures conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests –

> such as, for example, seizure by means of deadly force, see *Tennessee v. Garner*, 471 U.S. 1 (1985), unannounced entry into a home, see *Wilson v. Arkansas*, 514 U.S. ___ (1995), entry into a home without a warrant, see *Welsh v. Wisconsin*, 466 U.S. 740 (1984), or physical penetration of the body, see *Winston v. Lee*, 470 U.S. 753 (1985).

This Term, in *Ohio v. Robinette*, 117 S.Ct. 417, 421 (1996), the Court reiterated that, when Fourth amendment reasonableness is at issue, it

> is measured in objective terms by examining the totality of the circumstances.
>
> In applying this test we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry. Thus, in *Florida v. Royer*, 460 U.S. 491 (1983), we expressly disavowed any "litmus paper test" or single "sentence or . . . paragraph . . . rule," in recognition of the "endless variations in the facts and circumstances" implicating the Fourth amendment. *Id.*, at 506. Then, in *Michigan v. Chesternut*, 486 U.S. 567 (1988), when both parties urged "bright-line rules applicable to all investigatory pursuits," we rejected both proposed rules as contrary to our "traditional contextual approach." *Id.*, at 572-73. And again, in *Florida v. Bostick*, 501 U.S. 429 (1991), when the Florida Supreme court adopted a *per se* rule that questioning aboard a bus always constitutes a seizure, we reversed, reiterating that the proper inquiry necessitates a consideration of "all the circumstances surrounding the encounter" *Id.* at 493.

Just five weeks before our argument, the Court applied this principle in *Maryland v. Wilson, supra*, slip op.

3. The court engaged in a balancing of interests to determine whether ordering passengers out of a car during a traffic stop was reasonable, and it concluded that it was. *Id.* at 4-6. *See* point I.B., *infra.*

The fact remains, however, both sides can marshall empirical evidence that supports their position. Police get shot, and innocent people get shot. This probably will continue no matter how this case comes out because police and citizens are killed right now both with and without announcement. But isn't that the point? We are dealing with a search that happens, in Justice Scalia's words from *Whren*, "in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests." Petitioner believes that his proposed rule will save lives.

Because guns are "tools of the trade," Respondent and *amici* assume that drug dealers with guns have them just to shoot the police. Common sense suggests otherwise; the police are not the victims of violence in the cases they cite. Rather, the cases usually show that drug dealers carry guns to protect their valuable stash from those who would steal it or rob them of it.[1] *See, e.g., United States v. Sanchez-Barreto*, 93 F.3d 17, 19 (1st Cir.1996); *United States v. Singer*, 943 F.2d 758, 762 (7th Cir.1991) (inference of drug dealing found from possession of firearm and past threats); *United States v. Golter*, 880 F.2d 91, 93 (8th Cir.1989); *United States v. Alvarez*, 860 F.2d 801, 830 (7th Cir.1988) (gun "raised the inference that the cocaine was valuable to Ms. Rivera and, therefore,

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[1] Petitioner did not have a gun, and there is no suggestion that officers thought would find one when they searched.

that it was worth protecting"); *United States v. Sarda-Villa*, 760 F.2d 1232, 1234 n. 1 (11th Cir.1985); *State v. Williams*, 168 Wis.2d 970, 977, 485 N.W.2d 42, 44 (1992) ("According to the informant, Williams carried the gun because he had previously been threatened by another drug dealer.").[2] If the police announce their presence, then it is always going to be against the best interest of a drug dealer to engage in a shoot-out, just as it is in the best interest of police to avoid a shoot-out. The drug dealer foolish enough to resist will almost invariably be shot or killed. Balancing is mandated; too much is at stake for either side to have a blanket or *per se* rule.

The practical reality is that modern day police practices are such that the police bring overwhelming force to virtually every search warrant scene and use it whether or not announcement occurs. Here, there were apparently eight to ten officers for an unarmed man in a motel room. It is not surprising to see twenty or more officers show up for a drug raid along with the SWAT Team; sometimes there are a lot more. *See, e.g., United States v. Ramirez*, 91 F.3d 1297, 1299 (9th Cir.1996) ("45 armed officers" showed up at 6:15 a.m. raid while occupants were believed to be asleep). After all, the show of force is the whole point.

The Respondent suggests that *Michigan v. Summers*, 452 U.S. 692 (1981), is another example of a bright line rule which ought to persuade this Court to ratify the blanket exception adopted by the Wisconsin Supreme

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[2] The United States cites *State v. Stevens*, 181 Wis.2d 410, 511 N.W.2d 591, 596-97 (1994), *cert. denied*, 115 S.Ct. 2245 (1995), for this proposition (U.S.Br. 14 n. 6), but *Stevens* cites and relies on *Williams*.

Court. What the Respondent fails to acknowledge is that *Summers* does not deal with entry to a home or even the search of one. Rather, *Summers* allows the police to temporarily detain occupants present on the premises while a search warrant is being executed. It is, therefore, more analogous to *Maryland v. Wilson* than to the instant case.[3]

B. *Maryland v. Wilson* which authorizes the police to have passengers get out of a car during a traffic stop does not authorize a blanket rule in an unannounced entry of the home.

The Respondent argues that *Maryland v. Wilson* stands for the proposition that a bright line rule allowing the police to enter a home with a search warrant and without announcement is permissible under the Fourth Amendment. *Maryland v. Wilson* permits a lone police officer making a traffic stop to order passengers out of a vehicle in order to protect the officer's safety during the stop. This Court determined that there is only one limited change in circumstance occasioned by allowing police officers this authority: The passengers "will be outside of, rather than inside, the stopped car." *Id.*, slip op. 4. It is this extremely limited intrusion which, when balanced against the need for officer safety, permits this type of

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[3] A different, but related, situation exists with regard to searches of persons. For example, the public interest in prison and jail security allows the government to perform warrantless, suspicionless searches of persons entering such facilities. *See, e.g., Black v. Amico*, 387 F.Supp. 88 (W.D.N.Y.1974). However, this authority is not absolute. A strip search can never be justified by a blanket rule. Such a search must be based upon reasonable suspicion. *Hunter v. Auger*, 672 F.2d 668, 675-76 (8th Cir.1982).

seizure. *Maryland v. Wilson* has nothing to do with unannounced forcible entries of the home where the door is smashed in without announcement.

When the police *en masse* forcibly and unannounced enter a home, the level of intrusion is overwhelmingly and undeniably greater: Property is destroyed, the occupants, including children, spouses and guests, are intentionally frightened and intimidated by strange people pointing guns at them and threatening to shoot them if they even move.[4] Sometimes even stun grenades are lobbed in before they enter in this paramilitary operation. There are occupants who may be engaged in private intimate activities who are suddenly confronted by strangers waiving guns and shouting threats. *Hall v. Shipley*, 932 F.2d 1147 (6th Cir.1991) (Hall was engaged in intercourse with his girlfriend, and the officers in the raiding party mistook the sounds of their lovemaking for Hall attempting to flush drugs down the toilet; the drug offense he was allegedly guilty of was so minor compared to what he went through that he was not prosecuted). What greater search of the home can be envisioned by anyone?

All too often, the police or the occupants feel threatened enough to respond with violence. It is for this reason that the Fourth Amendment has always provided that the manner of entry is subject to special scrutiny. Simply put, it is wrong, dead wrong, to equate a momentary, public, non-violent detention at a roadside with a violent forcible entry by the government into one's home.

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[4] One innocent man, a preacher, died of a heart attack after being chased through his house by police after a raid based on bogus information. (Petr.Br. 33 n. 18)

As stated in Petr.Br. at 15-17, the Fourth Amendment has always provided greater protection inside the home than anywhere else. No Fourth Amendment case has ever drawn such a parallel, and this is not the place to start.[5]

C. The government's alternative blanket rule does not comport with the Fourth Amendment. It is not workable.

The United States agrees that an absolute blanket rule does not comport with the Fourth Amendment's reasonableness test. Its position is that where the police possess specific knowledge that indicates there is no exigency, an unannounced entry is not permitted. Where, however, such knowledge is lacking, the "general experience" of law enforcement in drug cases militates in favor of an unannounced entry. The government refers to this as a "workable rule" (U.S.Br. 25). It is anything but, and here is why:

1. The police have no incentive to acquire or document information which could be used to later demonstrate that they illegally entered a home.

2. Even where the police possess such information, is the officer who has it required to communicate it to the home invasion team executing the warrant? If such a duty exists, and it is breached, what is the remedy?

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[5] The position advocated by the Respondent prevents citizens from obtaining judicial review of government's choice regarding the manner in which homes are entered. Because the home, unlike the roadside, is entitled the greatest amount of Fourth Amendment protection there is no justification for abandoning an aggrieved citizen's right to such review.

3. It is unclear what level of knowledge is required before the police are required to knock and announce. It is reasonable suspicion, probable cause, or some other standard?

4. Often search warrant information is developed through the use of a confidential informant. There may be no ability for the defense to learn the identity of such an informant, and all the information he possesses, because of the informer identity privilege. See, e.g., § 905.10, Wis. Stats.; Unif.R.Evid. 509.

5. The government's position does not clarify whether there is a requirement that the police acquire information regarding the need for announcement – assuming such information is available. If there is a duty, what is the remedy if it is breached?

6. Who has the burden of going forward and burden of proof at a suppression hearing when lack of announcement during execution of a warrant is at issue?

D. The law enforcement community is not in agreement that a blanket rule is appropriate or necessary.

Amicus Attorney General of Ohio, speaking for the attorneys general of 26 states, Guam, and Puerto Rico has, like the United States, opposed an absolute blanket rule. The attorneys general state (Ohio Br. 14):

> The harder question is whether the proper result here – noncompliance with the announcement rule – invariably applies when police officers execute felony drug search warrants. The answer is an unqualified no. Normally the generalized peril to officers conducting such

> searches together with the risk of destruction of evidence will give them discretion to abandon the niceties of knocking and announcing their presence. But, because easily imagined situations exist in which objective evidence will substantially (if not entirely) diminish these dangers, it is not appropriate to establish a categorical no-knock rule.

Even more significant, we submit, are the states that joined Ohio in its brief. The Attorney General of Maryland who advocated for a blanket rule in *Maryland v. Wilson* joined in Ohio's opposition to a blanket rule involving no-knock execution of search warrants of the home. The Attorney General of Arkansas, who wanted a blanket rule two years ago in *Wilson v. Arkansas*, now has decided against asking for one. It should also be noted that Nebraska, which has had a blanket rule for many years; *see State v. Meyer*, 311 N.W.2d 520, 522 (Neb.1981); now opposes such a rule.

Although the Attorneys General of 26 states and the Solicitor General acknowledged that the execution of search warrants in drug cases poses some threat to the safety of law enforcement officers and citizens, citing statistics (Ohio Br. 10-12; U.S.Br. 15-17), they do not make the quantum leap to the blanket rule that the Respondent does.

There are many examples of situations where the need to knock and announce will always be present. For example: a residence where only children are known to be home; a home not occupied by anyone suspected of drug trafficking because the suspected drug dealer is

already incarcerated[6]; a search warrant executed at the home of an innocent third party where a dealer has stashed drugs; an undercover officer with a hidden microphone on the premises to be searched and no known risk of destruction of property or danger to officers; a successful ruse which has gotten the dealer outside (as was attempted here); or a controlled delivery by Federal Express, U.P.S., or the post office delivered by subterfuge to an unsuspecting home owner.

Chief Justice Abrahamson of the Wisconsin Supreme Court below in *State v. Richards*, 201 Wis. 2d 839, 870, 549 N.W.2d 218, 231 (1996), concurring in the result but opposing a blanket rule, said "while the death or injury of even one law enforcement officer is one too many, the empirical evidence cited does not support the majority's rationale that executing search warrants in drug cases is more dangerous to officers than other activities." The Ohio Attorney General pointed out that there are no statistics related to the number of injuries to officers in execution of warrants, not to mention in drug cases. (Ohio Br. 10) The Department of Justice in its Uniform Crime Reports apparently does not consider the subject statistically significant enough to have a separate category. While in *Maryland v. Wilson*, the number of assaults on officers making traffic stops was empirical evidence of threats to officer safety, many of the newspaper articles

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[6] *See, e.g., Larson v. Wisconsin*, 203 Wis.2d 270, 551 N.W.2d 870 (Ct.App.1996) (table; unpublished), *review denied*, 205 Wis.2d 135, 555 N.W.2d 815 (1996) (table), *pet. for cert. pending* No. 96-7167 (police entered without announcing and the incarcerated defendant's family was there).

cited by the Respondent are ten years old or more. (Resp.Br. 14)[7]

Moreover, the Department of Justice's own *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted* (UCR) from 1981 to 1994 suggest probably only seven officer deaths occurring during drug raids where an announcement was clearly reported. (Petr.Br. App. B) This is not to minimize the risk to the police in executing search warrants for drugs. However, under existing procedures, accommodating Fourth Amendment interests, even after the assertedly necessary "dynamic entry," the peril is not from unannounced entry, but from officers being shot by assailants hiding in other rooms in the residence after the entry, presumably after the occupants have heard the shouting of the police officers pointing guns at their heads of others while they are on the floor face down being handcuffed (but maybe not). There is no way of knowing from the UCR summaries whether the shooters knew that the intruders were police in spite of alleged announcement.

E. The safety of both police and citizens is enhanced by the knock and announce rule.

All knock and announce cases recognize that officer safety is enhanced by announcement because it gives the target of the search notice that they are not just armed intruders committing an unlawful entry. *Sabbath v. United States*, 391 U.S. 585, 589 (1968); *Ker v. California*, 374 U.S. 23, 57-59 n. 12 (1963) (concurring opinion); *Miller v. United States*, 357 U.S. 301, 310-11 (1958); *McDonald v.*

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[7] As were the secondary authorities relied on below. (Petr.Br. 26)

United States, 335 U.S. 451, 460-61 (1948) (Jackson, J., concurring). To extrapolate on this point, a citizen's resistance to an armed police officer puts the citizen at risk, too. One who dares shoot a police officer, accidently or on purpose, while twenty more are behind him will almost surely die (as noted in the UCR summaries), but not always.[8]

Citizen safety was at issue in determining the reasonableness of police use of force in *Tennessee v. Garner*, 471 U.S. 1 (1985) (holding that a fleeing non-violent felon cannot be shot to arrest him), and *Brower v. County of Inyo*, 489 U.S. 593, 598-99 (1989) (manner of setting up roadblock to stop a car was unreasonable).

And what about informant lies that cause searches to occur? *See* Susan Watson, "A Little Stress Would Be Too Much," *Detroit Free Press*, January 16, 1989, 3A (a 2:10 a.m. raid of the wrong house, based on informant's lie, resulted in a man being shot to death in his own bed – the police fired 183 rounds).

Therefore, the safety of *all* concerned should be a part of the reasonableness calculus, not just officer safety.

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[8] At least two post-*Wilson v. Arkansas* criminal appeals are pending which involve citizens convicted of murder of police officers who claim they were merely defending themselves from intruders who failed to properly identify themselves as police. *State v. Stephen Shively*, Kansas Supreme Court No. 96-77100 (docketed July 6, 1996); *State v. Willie Green*, Arkansas Supreme Court No. CR97-59 (docketed January 18, 1997).

Mincey v. Arizona, 437 U.S. 385 (1978), *rev'g on other grounds*, 115 Ariz. 472, 566 P.2d 273 (1977), involved a defendant who shot a police officer during a raid claiming that he did not know that the persons with guns were the police.

F. The horror stories which flow from failure to knock and announce show that the Fourth Amendment's reasonableness requirement does not allow a blanket rule.

The risks to householders, the people explicitly protected by the Fourth Amendment, are increased when an unannounced entry occurs. *See Orosco v. County of Yolo*, 814 F.Supp. 885, 889 (E.D.Cal.1983) (early morning no-knock drug raid in Madison, CA resulted in a mentally-ill family member being shot and killed when the police tried to push open the door of a back bedroom; no drugs were recovered); Thomas Haynes, "Federal Judges Trying To Change The Color Of Juries," *Seattle Times*, Feb. 12, 1996, A1 (during an unannounced raid, Seattle police shot a black householder who was holding a TV remote control which the police thought was a gun; no drugs were recovered; an all-white jury awarded no damages to his family in the subsequent wrongful death suit); *Lavoie v. Hudson*, 740 F.Supp. 88 (D.N.H. 1990) (the search warrant affidavit contained intentional and reckless material misrepresentations; as the police entered unannounced, the unarmed homeowner was shot to death in his son's bedroom in the son's presence).

Even some of the Respondent's horror stories support our conclusion.[9]

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[9] The Respondent has its own list of misfortunes that arise, from the law enforcement perspective, when drug search warrants are executed. This information is not the entire story. The rest of the story is: David A. Sylvester, "Fatal Shootout, Fire in Drug Raid, San Jose Officer Seriously Injured in 1-Hour Gunbattle," *San Francisco Chronicle*, March 20, 1991 (stun grenades used after door kicked in, woman and a 3 year old girl

II. THIS IS NOT A CASE FOR ADDRESSING INEVITABLE DISCOVERY.

The respondent injects into the case whether the exclusionary rule should even be applied. (Resp.Br. 41-45). There was no cross-petition raising this issue.

In *Wilson v. Arkansas, supra,* at 1919 n. 4, this Court declined to reach this same issue even though it was sought by respondent and *amici.* This court excluded evidence for violation of the knock and announce requirement and 18 U.S.C. § 3109 in *Miller v. United States,* 357 U.S. 301, 313-14 (1958), and *Sabbath v. United States,* 391 U.S. 585, 586 (1968).

Although it does not say so, Respondent's position would require this Court to effectively overrule *Miller* and *Sabbath* and say that a violation of the Fourth Amendment right of announcement, a rule with a seven century common law lineage, is of no consequence in a criminal case.

Respondent's argument overlooks one immutable constitutional fact: If the inevitable discovery rule is applied to the rule of announcement, the rule ceases to exist. If suppression cannot be a remedy for a failure to

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dashed out of the house after gunfire, house burned to ground killing one of occupants); Pierre Thomas, "One Killed, Four Wounded in Va. Drug Raid," *The Washington Post,* January 11, 1990, at D1 (18 year old and two juveniles injured); Phillip Wattley & Henry Wood, "Vest Saves Officer In Drug Raid," *Chicago Tribune,* November 1, 1986 (officer, after running into living room, shot by man hiding behind couch); Ray Perez, "Suspect Killed Officer Wounded In Shoot-Out," *Los Angeles Times,* March 22, 1985 (woman and small girl came out of house after suspected drug dealer killed). (Resp.Br. 13-14)

knock and announce, what motive would the police have to comply with the law? Existing civil remedies are no deterrent. Even self-interest in not getting shot is not a deterrent. *See* two recent cases cited in note 8, *supra*.

Respondent's inevitable discovery exception to the exclusionary rule, indeed its whole argument, ignores the rights of innocent persons inside. Whether they live there or are guests (*Minnesota v. Olson*, 495 U.S. 91 (1990)), they have a recognizable constitutionally protected interest in the premises, "for the Fourth Amendment protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967).

Innumerable knock-and-announce cases have been reported which mention innocent third-parties on the premises who either live with the suspected offender or just happen to be there at the time of the search. In this Court, we need go no further than *Wilson v. Arkansas* (friends were visiting at the time of the search; *id.*, Petr.Br. at 18-19) and *Sabbath*, 391 U.S. at 587 (unknown woman answered door who apparently was not arrested). There are cases where there are visitors engaged in intimate (including sexual) activities with the suspect; *see, e.g., Hall v. Shipley, supra;* or the suspect's wife and children who are suspected of nothing. *See, e.g., Lavoie v. Town of Hudson, supra; Sledd v. Lindsay*, 102 F.3d 282, 286 (7th Cir. 1996) (babysitter also present during raid); *United States v. Ramirez, supra* (defendant's family was in bed at time of early morning raid; defendant thought they were being robbed and fired gun into ceiling).

Of no small consequence are the rights of innocent people who are the victim of no-knock searches who die, not from gunfire, but because of a heart attack from the

emotional and physical distress from the "dynamic entry" and threats of the police. *See* note 4, *supra*.

The threat of criminal prosecution or civil actions do not deter violations of the knock-and-announce requirement. Respondent tells us that police will not be deterred by exclusion of evidence and such exclusion serves no purpose because the police are not exploiting any illegality. They want it both ways, and they want that to end the inquiry. By their own admission, they are exploiting a lack of announcement to get the sought-after evidence. All agree that the destruction of evidence exception is there to enable the police to find the evidence.[10] That is one of the rationales of the court below urged by the Respondent. So, by intentionally failing to announce, the police are, in fact, intentionally exploiting that illegality for the very purpose of catching the offender in possession of drugs.

Moreover, if the door is opened to an inevitable discovery analysis, then this Court will have to re-examine its rulings in at least one other area of the Fourth Amendment where evidence is now excluded, but would probably be inevitably discovered in the course of normal events.

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[10] As an aside, the United States notes that many offenders throw drugs out the window in an effort to destroy the drugs. (U.S.Br. at 19-20 n. 9) This proves too much. In each of those cases, the accused abandoned the drugs by leaving them for the police who recovered them and charged the accused with their possession. Thus, the drugs were hardly destroyed; the suspects were just distancing themselves from the drugs and essentially threw them into the hands of the police.

This Court has held that the search incident to arrest exception to the warrant requirement exists to ensure officer safety and preserve evidence. *Chimel v. California*, 395 U.S. 752, 755-56 (1969); *United States v. Robinson*, 414 U.S. 218, 234-35 (1973). *See also Terry v. Ohio*, 392 U.S. 1, 23-24 (1968) (stop and frisk for weapons). However, such a search is justified not by probable cause to arrest, but by the arrest itself. *Cupp v. Murphy*, 412 U.S. 291, 296 (1973). Therefore, where the search precedes the arrest the fruits of such a search may be inadmissible (especially where the arrest is based on the search). *See, e.g., State v. Swanson*, 164 Wis.2d 437, 450-53, 475 N.W.2d 148, 154-55 (1991). This is true despite the fact that such evidence would have been inevitably discovered once the officer exercised his or her option to arrest the suspect.

III. THE RESPONDENT'S USELESS GESTURE CLAIM CANNOT BE FAIRLY DETERMINED ON THIS RECORD.

When Steiney Richards opened the still-chained door an inch or an inch and one half, his field of vision permitted him to see a person dressed in a Ramada Inn maintenance man's shirt and an officer in full *military*[11] uniform (JA 38-39, 43). The record hardly shows unequivocally that, in Richards' line of sight, there was any

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[11] It is common for some officers performing drug raids to wear military clothing such as "army fatigue type clothes" without badges or other visible police identification. *See, e.g., United States v. Steward*, 867 F.2d 581, 584 (10th Cir.1989).

person easily recognizable as a police officer.[12] Whether knock-and-announcement was or would have been a useless gesture cannot be fairly determined on this record. A remand will be required to determine this issue. For useless gesture to apply, the officers must be "virtually certain" that the suspect is aware of their purpose; *Miller v. United States*, 357 U.S. 301, 310 (1958); and this they cannot show.

The Wisconsin Supreme Court found as a dispositive fact, for purposes of the appeal, that the police did not knock-and-announce prior to entry. *State v. Richards*, 201 Wis.2d 829, 843, 549 N.W.2d 218, 220 (1996). Respondent, on the other hand, claims that after a wait of two to three seconds, officers announced "police officers" and began to break down the door. (JA 39-41) Whether Petitioner heard them is also disputed. The facts as claimed by Respondent do not suggest that the police believed knock-and-announcement to have been a useless gesture under the circumstances. The Wisconsin court's approach to the issue obviated findings of fact, just like it obviates the officer's need to find facts.

The Respondent mentions the argument that making announcement would have given Petitioner the opportunity to flee. (Resp.Br. 21) this ignores the fact that this was a ground-floor motel room with officers waiting outside the window. When Petitioner jumped out the window at 3:40 a.m., it was into the arms of waiting officers. (JA 47)

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[12] Respondent does not admit this in its brief when it talks about what petitioner should have understood was happening that early morning.

IV. THE BROAD VIEW.

What is the potential cost of Respondent's position in constitutional and human terms?

In constitutional terms, the sanctity of the home will have been subordinated to this overwhelming need of Respondent to get drugs off the street. The "war on drugs," however, should not degenerate into a war on individual liberty. When common law and the Fourth Amendment rule of announcement can be classified as mere ceremony that can cost law enforcement officers their lives, individual liberty suffers.

In human terms, Respondent's fear of police shootings, however, never even considers the equally weighty risk that citizens will get shot, too. We agree that losing just one police officer's life is one too many; we just want the Court to recognize that losing one innocent citizen's life is one too many, too.

Dispensing with announcement will cost lives when homeowners defend themselves from the heavily-armed unknown intruders. Gunfire will erupt, bullets will fly, and there is nothing we can do to stop it. All we can do is pray that police officers will make the proper decision to announce or not before they go in based on the facts known to them at the time and not simply based on the class of crime involved. When they stand there at the threshold, they should pause and think and balance the facts they have with the need for announcement. Their lives and the lives of those inside could well depend on it.

Drugs have severely harmed our national fabric, but not just in the lives wasted from ingesting them or prison

sentences meted out. Drugs should not become a thumb on the scales of justice that exalts law enforcement interests over individual liberty and takes balancing out of the constitutional equation. That is just what this blanket rule does, and that is why it must be rejected.

CONCLUSION

The judgment of the Wisconsin Supreme Court should be reversed and remanded.

Respectfully submitted,

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